

## **APPENDIX K**

### **Additional Supporting Material**

ATTORNEY AT LAW

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E-MAIL: [jechilde@aol.com](mailto:jechilde@aol.com)

Col. Joe R. Miller, District Commander  
U.S. Army Corps of Engineers, Jacksonville District  
P.O. Box 4970  
Jacksonville FL 32232-0019

**VIA FIRST CLASS MAIL,**  
**RETURN RECEIPT REQUESTED**

**Re: Sixty (60) Day Notice of Intent to Sue Pursuant to Federal Clean Water Act**

I represent the Friends of the Everglades, a non-profit environmental organization with principal offices at 7800 Red Road, Suite 215K, Miami, FL, 33143, telephone (305) 669-0858, which has a significant interest in protecting the natural waters of the Everglades from pollution.

Section 505(b) of the Federal Clean Water Act, (“the Act”), 33 U.S.C. §1365(b), requires that sixty (60) days prior to the filing of a citizens’ suit in federal District Court under § 505(a) of

discharges, there is no continuing emergency, and the discharges have been allowed to continue for a period going on three years. These continuing discharges cause endangerment of other endangered species as well as specific harm to the Everglades plant systems; and to Water Conservation Area 3B.

Under Federal law, each day that you have discharged pollutants in violation of the Clean Water Act is a separate violation. Under 33 U.S.C. § 1319(d) of the federal Clean Water Act, the U.S. District Court may impose a civil penalty of up to Twenty-Five Thousand Dollars (\$25,000.00) per day, per violation.

If you have any questions or wish to discuss this matter, please feel free to contact me.

Sincerely,



John E. Childe

JEC/lms

cc: Hon. Christine Todd Whitman, Administrator  
Environmental Protection Agency  
401 M. Street, S.W.  
Washington, D.C. 20460

John Hankinson  
Regional Administrator  
Environmental Protection Agency, Region IV  
61 Forsyth Street, S.W.  
Atlanta, GA 30303-3104

Virginia Wetherall, Secretary  
Florida Department of Environmental Protection  
Twin Towers Office Building  
2600 Blair Stone Road  
Tallahassee, FL 32399-2400

U.S. Army Corp of Engineers  
441 G. Street, NW  
Washington, DC 20314

January 22, 2001

Executive Office

Ms. Maureen Finnerty  
Superintendent, Everglades National Park  
40001 S.R. 9336  
Homestead, Florida 33034

Mr. Steve Forsythe  
Florida State Supervisor  
U.S. Fish and Wildlife  
Service  
1360 U.S. Highway 1  
Suite 5, P.O. Box 2676  
Vero Beach, Florida 32961

Dear Maureen and Steve:

I have received your "Planning Aid Letter" (PAL) for the Interim Operating Plan (IOP) for the Central and Southern Florida (C&SF) project to protect the Cape Sable Seaside Sparrow (sparrow). I enclose a letter dated December 25, 2000 from the President's Council on Environmental Quality setting forth special arrangements for NEPA compliance in carrying out ISOP operations in the coming year and giving me instructions on the implementation of the Interim Structural and Operational Plan-2001 (ISOP) and IOP.

Before I address your letter, I must say that I enjoyed seeing you both at the Everglades Coalition. The meeting was another step in my orientation as the commander of the Jacksonville District. This orientation, as you would expect, has included a serious review of the record of the Jacksonville District's past actions and interagency dialog as well as candid conversations with my predecessors in command. From that review I am aware of the often difficult and contentious debates that have often been the defining character of our relationship with your agencies.

As a relative newcomer to this process, I believe the record reveals a clear pattern for those disagreements and points to a clear remedy. I think it is important to discuss that so we can achieve more productive professional relationships in the future. The record reveals that when my predecessors have asked you for biological opinions and information on how our actions might affect the resources within your areas of organizational responsibility, your response has frequently been expressed in terms of "required" hydrologic actions for water managers at the Corps and South Florida Water Management District. That "required" action is often based not just on biology or the physical requirements of lands you control, but on other disciplines outside your area of organizational expertise such as water management of the Central and Southern Florida project, and construction project design and execution.

My predecessors have studiously avoided publicly discussing the specific flaws in your "opinions" and "recommendations" when they venture outside the area of your organizational expertise and into the area of water management and, as a general rule, I will do the same. In this first instance during my command, however, I would like to illustrate my concern in the context of your "Planning Aid Letter" to point out what we must overcome...and I am determined to overcome...if we are to save not just the sparrow but the entire ecosystem in South Florida.

In the letter you state that, while the Corps' ISOP/IOP plan appears to meet the needs of the sparrows in subpopulations A, B, C and D, you are not certain about the proposal as it relates to meeting the hydrologic needs of the sparrows in subpopulation E and F. You raise the issue of releasing additional water into Northeast Shark River Slough, which you acknowledge is not an available option until the necessary private property rights are acquired and construction completed on features necessary to protect landowners and farmers from adverse impacts due to increased flows in the slough. I am aware that the Department of the Interior acquisition efforts in the Park Expansion Area may soon expand our options and encourage you to proceed with those efforts. It appears that your real reservations with the ISOP/IOP rest, not on biology, but rather on your hydrologic determinations. You state that there are "serious questions" regarding the reliability of the South Florida Water Management Model (SFWMM) as a tool for predicting water levels in the areas where subpopulations E and F reside. You further state that "hydrologic experts" from ENP and SFWMD agree that the 2x2 mile scale of the SFWMM make this model an insufficient tool with which to assess several aspects of the Corps' ISOP 2001/IOP proposal. You suggest the MODBRANCH model provides a better basis for analysis and that ENP staff, in your view have had success with this model. You conclude that ENP's hydrologic opinions represent the "best scientific information available", the Corps effort is incorrect and may, on the basis of unspecified "available information", cause "additional taking of sparrows and additional adverse modification of sparrow habitat." Your observations provide, in my opinion, the perfect illustration of what has gone wrong between our agencies for the last several years.

As I am charged to make decisions taking into account your comments on matters within your expertise I am forced to struggle with the following questions in making my decision. Given the fact that there are still outstanding issues that affect our confidence in the results generated by MODBRANCH (which we are all working to overcome), should I delay my efforts to protect the sparrow until perfection of the model or proceed on the basis of the best reliable hydrologic data I have? The SFWMM was, after all, sufficiently detailed for use in drafting your biological opinion and the recommendations based on it. How can I be sure that the biological opinion you wrote for the sparrow with its goal of quickly implementing the Modified Water Deliveries Project is still valid since it was designed using less refined data than that contained in the SFWMM? You recommend the Corps revert to the old Test 7 Phase II operations but if SFWMM is not a valid tool, how can I be sure that will produce hydrology that is good for the sparrow? Since the U. S. Fish and Wildlife Service (Service) has no expertise in water management, how are they qualified to conclude that the Corps is not the source of the "best available" hydrologic information on system the Corps designed, built and oversees

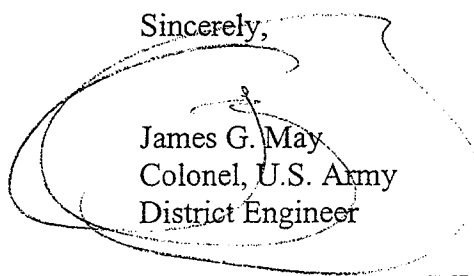
in terms of operations?

I don't raise these problems with your "Planning Aid Letter" to be critical of you or your respective staffs. I do want to illustrate the difficulty the Corps continues to experience when the biological information we need from your agencies is interspersed with uncoordinated hydrologic assumptions. You state that SFWMD experts and your staff feel a more precise model is needed to analyze all aspects of the ISOP/IOP. While I certainly agree that, as a general rule, the greater the resolution of a hydrologic model the more useful it is, my experts indicate that while we have made progress, the MODBRANCH model is still not ready for use. While I agree with your statement that detailed MODBRANCH modeling developed through interagency cooperation could provide reliable information in due course, as the person charged with making modifications to the Central and Southern Florida Project operations plans in light of the fact that the recovery of an endangered species would be assisted by my immediate action, I simply cannot wait until all the technical issues surrounding MODBRANCH can be adequately addressed. I feel I must proceed with the only valid technical information currently available. The SFWMM is well developed and widely accepted model. It shows that the ISOP/IOP operations will meet or exceed the RPA requirements for sparrow subpopulations E and F. Indeed, although we chose to constrain our use of 332B because of water quality concerns expressed by Everglades National Park, the SFWMM modeling results indicate that ISOP 2000 met the RPA targets. In our professional judgment, 332B with the new detention area we propose can meet the "reasonable and prudent actions" the Service has stated the sparrow requires with little or no overflow into the Park.

I want you both to know that I am serious in my resolve to protect the sparrow and other endangered species while moving forward with the improved water deliveries ENP so badly needs. I am pleased that our actions over the past several years have, despite challenging weather conditions, led to overall growth of the sparrow population.

I look forward to working with you both to forge a better understanding of our respective missions. I hope that such an understanding will allow the Corps and the South Florida Water Management District to better use your expertise. That will be even more important as we turn our attention to how species, to include the sparrow, and lands within Everglades National Park are likely to react to the increasing water levels we will introduce into the system as we implement the recently authorized comprehensive restoration effort.

Sincerely,



James G. May  
Colonel, U.S. Army  
District Engineer

Enclosure

DE/COL May:dh



EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY  
WASHINGTON, D.C. 20503

December 25, 2000

The Honorable Michael L. Davis  
Deputy Assistant Secretary of the Army  
(Civil Works)  
108 Army Pentagon, Room 2E570  
Washington, D.C. 20310-0108

Dear Mr. Davis:

I am writing in response to your letter of November 1, 2000, requesting that the Council on Environmental Quality (CEQ) provide guidance continuing alternative arrangements under 40 C.F.R. 1506.11 of CEQ's regulations implementing the National Environmental Policy Act (NEPA) for continuation of the Interim Structural and Operation Plan for Compliance with the Cape Sable Seaside Sparrow Biological Opinion.

The Department of the Army (Civil Works) first asked for alternative arrangements because of the need to take emergency actions in the course of operating the Central and Southern Florida Flood-Control Project in July, 1998. The emergency actions were necessitated by the effects of high water levels on certain populations of the highly endangered Cape Sable Seaside Sparrow. The Council's approval of alternative arrangements at that time came with the recognition that there could be a continued need for alternative arrangements over the course of several years until implementation of a long-term solution to those issues. (Letter from Kathleen A. McGinty, Chairman, Council on Environmental Quality, August 20, 1998). Such an emergency arose again during the late fall of 1999 due to extremely high water levels that were caused by Hurricane Irene. CEQ approved alternative arrangements for the Interim Structural and Operation Plan for Compliance with the Cape Sable Seaside Sparrow Biological Opinion (ISOP) later that year. Those alternative arrangements included preparation and distribution of an environmental assessment, public involvement, government to government consultation with the Micooskee and Seminole Tribes, close coordination with other federal, state and local agencies with jurisdiction and special expertise in issues involved in designing and implementing the ISOP, and a report to CEQ summarizing the results of monitoring and evaluating the ISOP. (Letter from George T. Frampton, Jr., Acting Chair, CEQ, December 23, 1999).

On January 28, 2000, you wrote asking for a modification of the alternative arrangements to accommodate completion of state consistency requirements under the Florida Coastal Management Program. That modification was granted. (Letter from Dinah Bear, General Counsel, CEQ, January 28, 2000).

The environmental assessment published in March, 2000, under CEQ's alternative arrangements, was intended to cover implementation of the ISOP until a new Interim Operating Plan (IOP) was in place. Last fall, it was anticipated that the IOP would be completed in time for the 2001 breeding season. However, that has not proven to be the case. The Corps determined it was necessary to begin implementing the ISOP this fall, as your November 1 letter indicates. Verbal concurrence with the continuation of alternative arrangements for the ISOP was given on November 6, 2000.

The Corps is in the process of preparing an environmental impact statement (EIS) on the IOP. CEQ's understanding is that the draft EIS for the IOP is scheduled to be published in February, 2001, and that Phase I of the IOP recommended plan will be the ISOP for 2001. A final EIS is expected to be available in June, 2001, with a final decision expected in the fall of 2001, in time for the 2001 breeding season.

Given these projections and assuming they prove correct, it appears that preparation of a separate EA for the 2001 ISOP implementation would be redundant in both timing and substance with publication of the draft EIS. On the other hand, given the immediacy of the 2001 breeding season, interested and affected parties in particular and the public in general should be given every opportunity to understand the Corps' plan for 2001 and to have comments on that part of the draft EIS considered expeditiously. Your letter indicates that the ISOP 2001 plan has already been presented to the South Florida Water Management District Governing Board. I recommend that you notify all other interested parties and the public of the details of the 2001 ISOP in January, along with an explanation that the environmental analysis for the ISOP will be contained in the draft EIS to be published in February. The analysis in the draft EIS should, of course, take into account the information learned from implementation of the ISOP in 2000, as well as highlighting changes to the ISOP for the 2001 season and projected impacts. Comments on the draft EIS relating to the ISOP should be identified as soon as possible for immediate consideration in the course of implementing the ISOP.

Should, however, it appear in January that the time for publication of the draft EIS is slipping, the Corps should immediately prepare an update to the EA published last March for the ISOP, with the analysis recommended above. That update (which could either be in the form of a new EA, a supplement to the EA or a Supplemental Information Report, depending upon the Corps' determination about the significance of the modifications to the ISOP) should be circulated to the public for review and comment by March 1, 2001. In all events, CEQ should be notified by January 10<sup>th</sup> of how the Corps intends to proceed with public notification and environmental analysis for implementation of the ISOP in 2001.

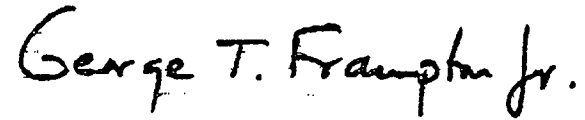
CEQ is concerned about continuing this year-by-year approach to the situation, and I know that you share those concerns. We stand ready to work with you and the Corps of Engineers and with other involved parties to ensure a resolution of important matters related to these issues. We also recommend that the Corps and other involved federal agencies seek the services of the U.S. Institute for Environmental Conflict Resolution to facilitate improved processes for bringing these matters to closure. While CEQ is mindful of the biological emergency necessitating these types of arrangements, we believe further alternative



arrangements for these actions – absent an unforeseen or extraordinary event – should be unnecessary.

Please do not hesitate to contact me or Dinah Bear, CEQ General Counsel, if you wish to discuss this matter further.

Sincerely,

A handwritten signature in black ink that reads "George T. Frampton Jr." The signature is written in a cursive, slightly slanted style.

George T. Frampton, Jr.  
Chair

GTF/dss



EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY  
WASHINGTON, D.C. 20503

December 25, 2000

The Honorable Michael L. Davis  
Deputy Assistant Secretary of the Army  
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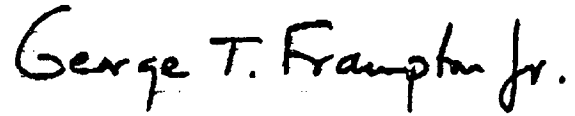
CEQ is concerned about continuing this year-by-year approach to the situation, and I know that you share those concerns. We stand ready to work with you and the Corps of Engineers and with other involved parties to ensure a resolution of important matters related to these issues. We also recommend that the Corps and other involved federal agencies seek the

[REDACTED]

arrangements for these actions – absent an unforeseen or extraordinary event – should be unnecessary.

Please do not hesitate to contact me or Dinah Bear, CEQ General Counsel, if you wish to discuss this matter further.

Sincerely,

A handwritten signature in black ink that reads "George T. Frampton Jr." in a cursive script.

George T. Frampton, Jr.  
Chair

GTF/dss



our staffs have not completed a full analysis of this particular run. However, we have completed an analysis of the previous model run, ISOP9db24 and, based on descriptions provided by your staff, we assume for purposes of this PAL that ISOP9db28 results will be similar. A more detailed discussion of our analysis of modeled alternatives and the ecological basis for our recommendations will be provided in an FWCA Report, to be prepared subsequent to your publication of a draft Environmental Impact Statement for the IOP.

We are pleased to note that significant progress on this project has been accomplished since our May 24, 2000, PAL. ISOP9db28 appears to meet RPA targets for subpopulations A, B, C and D. Remaining issues center on efforts to provide the hydrologic equivalent of RPA targets in the subpopulation E and F areas without releasing additional water into Northeast Shark River Slough. Our comments are provided below by area.

#### Western Shark Slough - subpopulation A

As documented in our November 2, 2000, letter to you, the Service has concluded that the best currently available scientific and commercial information indicates that the Corps' ISOP 2001 proposal for S12, S343 and S344 operations (as modeled in ISOP9db28 and several other runs) will fulfill the February 19, 1999, RPA's requirement for the subpopulation A. This represents a significant improvement in the likelihood of successful nesting for the sparrow, and resolution of difficult and long-standing policy and technical questions.

We are hopeful that this set of operations will continue to be part of your preferred alternative for the ISOP and IOP. However, Mr. Richard Punnett of your staff has indicated that some Corps staff have expressed reservations regarding effects these operations may have on structural integrity of the C&SF Project works during high water periods. If modifications to the current proposal are indeed necessary, Service evaluation of any changes would require additional modeling runs to ensure that subpopulation A habitat areas would not be adversely affected. Any such changes would have to be re-evaluated for compliance with RPA requirements.

#### Subpopulations B,C and D

Operational modifications included in ISOP9db28 and several similar runs appear to have addressed the concerns we identified for the subpopulation C and D areas in our May 24, 2000, PAL. Both breeding habitat availability and hydroperiod frequencies appear to closely match conditions expected under the exact provisions of the RPA, and should provide for some habitat improvement in the subpopulation C and D areas. Hydrologic conditions in the subpopulation B area did not change significantly under any of the alternatives, as expected.

We are hopeful that ISOP performance in these habitat areas will continue to meet RPA targets as further modifications are made in other areas. However, it is possible that resolution of issues discussed below surrounding operations of the S332B pump and retention area(s) may lead to changes in the volume and/or timing of flows moving towards downstream structures that would

### Subpopulations E and F

As noted in our May 24, 2000, PAL, SFWMM results for ISOP alternatives in the subpopulation E and F areas appeared promising at first glance, but serious questions regarding the reliability of SFWMM results in this area remained. Since our previous PAL, SFWMD staff have revised the SFWMM model to better represent the ISOP pump and retention area(s). This revised model

While this most recent SFWMM modeling (including ISOP9db28) suggests that an additional retention area may significantly improve ISOP performance in the subpopulation E and F habitats, hydrologic experts from ENP and SFWMD agree that the 2x2 mile scale of the SFWMM makes this model an insufficient tool with which to assess several aspects of the Corps' ISOP 2001/IOP proposal. These experts have stated to the Service that the SFWMM cannot reliably estimate water levels in the retention area(s), water levels in upstream habitat

These results, along with an analysis of actual data collected during operations of the S332B pump and retention area this year (provided to the Corps via a July 19, 2000, e-mail message from Dr. Thomas Van Lent of ENP to Mr. Dennis Duke) suggest that S332B could be operated, using different operations than any proposed by the Corps so far, in a way that would push enough water into the subpopulation E habitat to meet RPA targets there. However, in providing the hydrologic head necessary to push water to subpopulation E, areas of subpopulation F habitat near the retention area(s) would experience much longer hydroperiods and deeper water depths than called for in the RPA. Available information suggests that these depths and hydroperiods would cause the vegetation in a significant portion of the subpopulation F habitat area to convert to a composition unsuitable for the sparrow, and may also prevent or interrupt sparrow breeding in these areas in wet years. MODBRANCH modeling of S332B operations proposed by the Corps suggests that similar flooding of subpopulation F habitat will occur under ISOP 2000, ISOP9db28 and similar proposals.

Therefore, the best scientific information available to the Service at this time indicates that ISOP9db28 will not provide the hydrologic equivalent of RPA requirements outlined in our BO for both subpopulations E and F. Further, available evidence suggests that operations of this kind may cause additional taking of sparrows and additional adverse modification of sparrow



not allow direct comparison of RPA130 with ISOP9db28 or similar runs. Mr. Punnett recently agreed to revise the web site information to provide these comparisons, but they are not available currently. These comparisons will need to be provided prior to initiation of our work on an FWCA Report for the IOP.

The second issue is capacity of the S333 structure. As noted in our May 24, 2000, PAL, the simulations provided by the Corps show that the imposed constraint of 1,350 or 1,450 cubic feet per second (cfs) at S333 affects flows into Northeast Shark Slough about half of the years. This constraint significantly affects the RPA simulations and the degree to which the RPA's 30 percent, 45 percent, and 60 percent targets for regulatory releases into Northeast Shark Slough are achieved.

The BO recognizes that some limit to flow through S333 exists. However, in our view, restrictions to flow at S333 are imposed by either (a) the physical limits of the structure to pass flows (such as structure size and construction, available water, head differences across the structure, and getaway capacity); or (b) constraints imposed by conditions or operations that would threaten or compromise the integrity of the structure. The Corps chose 1,350 cfs as the upper limit not because of the above reasons, but because that was what the structure was designed to pass. This would, therefore, be a conservative estimate of the physical limits of the structure. Tests demonstrate flows could easily exceed 1,450 cfs, and the highest observed flow was 1,580 cfs. The Corps and SFWMD, during the Modified Water Deliveries conveyance simulations, modeled sustained flows of 2,000 to 2,500 cfs. This was based upon the physics of flow and observed flow measurements, and SFWMD has provided information suggesting flows in this range will not compromise structural integrity. We accept this as a reasonable analysis on the physical limits of the structure. However, we acknowledge that Corps staff disagree with some aspects of this assessment and believe that S333 cannot safely pass more than 1,350 cfs without reinforcement. Mr. Dennis Duke of your staff has stated to us that the Corps will consider installation of rip-rap or other structural reinforcement in order to increase S333 capacity. We urge the Corps to include these measures in all ISOP/IOP alternatives.

#### Summary and recommendations

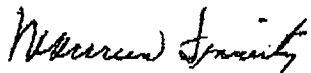
1. Significant progress has been achieved since our May 24, 2000, PAL. ISOP9db28 appears to meet RPA requirements for subpopulations A, B, C and D.
2. Hydrologic experts from the SFWMD and ENP agree that current modeling of ISOP9db28 cannot reliably answer remaining questions regarding whether RPA targets in subpopulations E and F can be met as envisioned in ISOP9db28.
3. MODBRANCH modeling and analysis of ISOP 2000 operations performed by ENP experts suggest that ISOP9db28 operations will not meet RPA requirements in subpopulations E and F. Therefore, the Service is not able to concur with ISOP9db28, or

similar proposals that include use of the S332B pump and retention area(s), for subpopulations E and F at this time.

4. The Service recommends that Corps, SFMWD and ENP experts work together to expeditiously model ISOP operations using the MODBRANCH model, in hopes that this more detailed and more reliable information can be used to develop an ISOP proposal that will meet all RPA targets. This effort should be completed prior to development of NEPA documentation for the IOP.
5. IOP alternatives should include structural reinforcement of the S333 structure in order to maximize capacity.
6. Until concurrence on an ISOP alternative can be achieved, we recommend that the Corps immediately implement Test 7 Phase II operations in the SDCS, as modeled in RPA102.

We continue to appreciate the hard work and long hours invested by many members of your staff in this effort and are hopeful that concurrence will be possible in the near future. For further information or assistance, please contact Dave Sikkema at (305) 242-7814 or Heather McSharry at (561) 562-3909, extension 247.

Sincerely yours,



Maureen Finnerty  
Superintendent  
Everglades National Park



Stephen W. Forsythe  
State Supervisor-Ecological Services  
Fish and Wildlife Service

cc:

Assistant Regional Director, Ecological Services, Service, Atlanta, Georgia  
Executive Director, South Florida Water Management District, West Palm Beach, Florida  
Florida Dept. of Environmental Protection, Tallahassee, Florida  
Florida Dept. of Agriculture and Consumer Services, West Palm Beach, Florida  
Miccosukee Tribe, Miami, Florida  
Seminole Tribe, Hollywood, Florida  
Miami-Dade County DERM, Miami, Florida  
Field Supervisor, Service, Vero Beach, Florida  
Florida Fish and Wildlife Conservation Commission, Vero Beach, Florida



DEPARTMENT OF THE ARMY  
SOUTH ATLANTIC DIVISION, CORPS OF ENGINEERS  
ROOM 9M15, 60 FORSYTH ST., S.W.  
ATLANTA, GEORGIA 30303-8801  
JUN 1 2000

REPLY TO  
ATTENTION OF

Programs Management Directorate

Mr. Sam D. Hamilton  
Regional Director  
U.S. Fish and Wildlife Service  
1875 Century Boulevard  
Atlanta, Georgia 30345

Dear Mr. Hamilton:

I am writing in regard to the May 15, 2000, letter from Mr. Steve Forsythe of your Vero Beach Office to Colonel Joe Miller, Jacksonville District, which presents additional clarifying information on the February 19, 1999, Final Biological Opinion on the Experimental Program of Water Deliveries to Everglades National Park. This letter provides an interim reply on behalf of the Corps of Engineers.

We believe that an exception must be declared to the Reasonable and Prudent Alternative requirements associated with the western sparrow population due to an extreme and unpredictable Act of God in the form of a severe rain event in April 2000, which caused the 6.0 foot level at NP 205 to be exceeded. Mr. Forsythe's letter restated the three basic conditions that must be met to warrant an exception from the Reasonable and Prudent Alternative. Each condition is specifically discussed below:

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a. To date, all requirements of the Reasonable and Prudent Alternative for which the Corps has authority to implement have been implemented. We continue to work toward a September 2000 completion of the Environmental Impact Statement for the Interim Operational Plan which, as you know, will be used in future breeding seasons to meet the requirements of the Reasonable and Prudent Alternative. We appreciate your continued support in efforts to meet the aggressive schedule that the Council on Environmental Quality has asked us all to meet.

-2-

b. The rain event, which occurred between April 12 and April 16, 2000, dropped an average of 8.5 inches of rain on the area which contributes runoff to the NP-205 gage. The gage directly north of NP-205, at 40 Mile Bend, registered 4.14 inches of rain in 4 hours on April 13. It should be noted that average rainfall for the month of April over the period 1895-1999 is 2.4 inches. Water levels at NP-205 increased from 4.63 ft-NGVD on April 13 to 6.08 ft-NGVD on April 14. By April 18, water levels had receded to 5.97 ft-NGVD. Water levels at NP-205 increased and peaked the second time to 6.13 ft-NGVD on April 22 due to a lag in the runoff from the area to the north of NP-205 (but outside WCA-3A) where rainfall was the heaviest. From April 26 to the present, water levels have been below 6.0 feet. We have determined that under any water management scenario (other than one in which there was a levee circling the population A habitat with sumps operating), including Test 7 Phase II operating conditions, water levels would have exceeded 6.0 feet at NP-205 during this rainfall event.

c. The Corps took prudent management actions to provide a storage buffer that would allow normal rainfall to occur throughout the Central and Southern Florida basin without bringing NP-205 water levels back above the target. All structures that might affect population A have remained closed since February 15, a month earlier than normal, to allow for a drying out of the population A habitat. Further, we lowered the WCA-3A pool level below its normal dry season level to accommodate unexpected rainfall. Together, these actions have allowed all releases from WCA-3A since February 15 of this year to move water east of the L-67 extension levee.

The Corps remains committed to taking all practicable measures to protect the endangered Cape Sable Seaside Sparrow. As noted in your December 14, 1999, letter to Colonel Miller, the Interim Structural and Operational Plan was designed to meet the year 2000 requirements of the biological opinion, including the Reasonable and Prudent Alternative. This cooperatively formulated alternative has

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shown a remarkable ability to provide favorable nesting conditions for the Cape Sable Seaside Sparrow thus far, and we will continue to operate the system using the Interim Structural and Operational Plan for the remainder of this breeding season. We plan to provide a full report on all Corps' efforts for the year 2000 breeding season at the conclusion of the breeding season.

Thank you for your consideration of this request. I am confident that you will agree with me that an exception is called for in this situation.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. Richard Capka", followed by a horizontal line extending to the right.

J. Richard Capka  
Brigadier General, U.S. Army  
Division Engineer

BEFORE THE STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In re:

EMERGENCY AUTHORIZATION TO )  
OPERATE THE S-332B AND S-332D PUMP )  
STATIONS )  
\_\_\_\_\_ )

OGC Case Nos.: 00-0889  
and 99-2242

**SECOND AMENDED EMERGENCY FINAL ORDER**

Under Section 373.119 of the Florida Statutes and Rule 62-330.300(3)(b), F.A.C. (incorporating by reference Rule 40E-4.451, F.A.C.), the State of Florida Department of Environmental Protection (Department) enters this Emergency Final Order, including findings of fact and conclusions of law, in response to the imminent or immediate danger to the survival of the Cape Sable Seaside Sparrow, an endangered species, made necessary by hydrologic conditions in the vicinity of nesting habitat of this species. This order amends and supersedes Emergency Final Order OGC

FILED IN OGC Case No. 00-2242-10000

2. The U. S. Fish and Wildlife Service (USFWS) issued a "jeopardy" Biological Opinion February 19, 1999, concerning six sub-populations (A-F) of the endangered sparrow in Everglades National Park. The Biological Opinion includes a recommendation for "reasonable and prudent alternatives" to avoid jeopardizing the endangered sparrow. To meet the requirements of the Biological Opinion, the U.S. Army Corps of Engineers (hereafter, "Corps") developed the December 14, 1999 Interim Structural and Operational Plan (ISOP), which involved moving water out of Water Conservation Area 3A eastward via the L-29 Borrow Canal and southward via the L-31N Borrow Canal.

3. The existing S-332B pump station is a temporary pump station and detention area constructed by the Corps as an interim feature of the overall C-111 Basin project consistent with the ISOP. In exempting the construction of the S-332B pump station and detention area from the permitting requirements of Chapter 373, Florida Statutes, the Department advised the Corps (Notice of Exemption No. 0164938-001-EE) that a permit was required for the operation of the S-332B pump station.

4. On April 21, 2000, the Department issued Emergency Final Order No. 00-0889 authorizing the Corps to operate the S-332B pump station consistent with the ISOP. The S-332B pump station is operated to withdraw water from the L-31N borrow canal and discharge westward into a detention area adjacent to Everglades National Park. The original expiration date of the Emergency Final Order was June 16, 2000. The expiration date of the Order was subsequently extended to October 26, 2000 through the Department's issuance on June 19, 2000 of a First Amended Emergency Order.





8. Hydrologic conditions in the vicinity of the Sparrow's habitat continue to threaten the viability of the Sparrow, necessitating the continued operation of the S-332B and S-332D pump stations in accordance with the ISOP beyond the current expiration date of the Emergency Orders authorizing operations of those two pump stations.

9. The Corps has agreed to continue water quality and hydrologic monitoring in the C-111 Basin canals, at the S-332B and S-332D pump stations, and in the vicinity of the pump stations to identify and evaluate water quality and hydrologic conditions. The monitoring work enables the adaptive operation of the pump stations to meet the requirements of the Biological Opinion and evaluate compliance with state water quality standards and the interim and long-term phosphorus concentration limits contained within the Settlement Agreement to the Federal Everglades lawsuit (CASE NO. 88-1886-CIV-HOEVELER).

10. The Department finds that an extension of the expiration date of Emergency Final Order Nos. 00-0889 and 99-2242 is necessary to allow the Corps to continue to operate the S-332B and S-332D pump stations and appurtenant structures consistent with the ISOP and to complete their application for a permit. Operation of the pumps is not expected to adversely effect the water resources of the State.

11. The Department finds that immediate, strict compliance with the provisions of the Department's Notice of Exemption No. 0164938-001EE dated January 24, 2000, and s. 373.413, F.S. and Rule 40E-4.041, F.A.C. as noted in paragraph 15 below of this Order would prevent, hinder, or delay necessary action in coping with the emergency.

12. The Department finds that this state of emergency is expected to continue up until June 30, 2001 unless a permit in accordance with Part IV of Chapter 373, Florida Statutes for the ~~monitoring operation and maintenance of pump station S-332B~~ is issued before that date. If a permit

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is issued before June 30, 2001, the requirements of this order shall be superseded by the general and specific conditions, including monitoring requirements, of that permit.

#### CONCLUSIONS OF LAW

13. Section 373.119 of the Florida Statutes gives the Department the authority to issue an Emergency Final Order if, as agency head, I find that an emergency exists requiring immediate action to protect the public health, safety, or welfare; the health of animals, fish or aquatic life; a public water supply; or recreational, commercial, industrial, agricultural or other reasonable uses; and the order recites with particularity the facts underlying that conclusion.

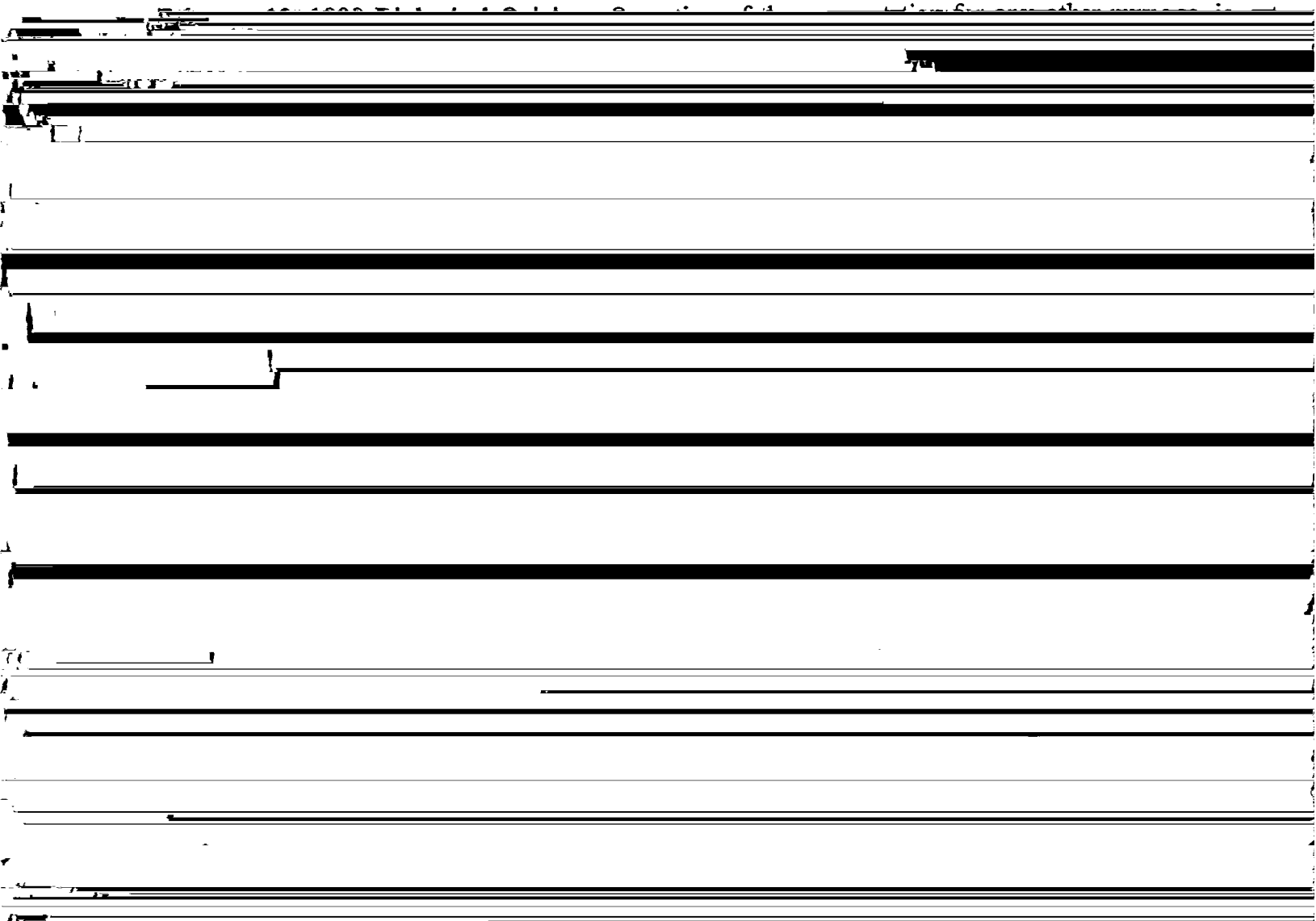
14. Based on the findings recited above, I hereby conclude that continued discharges from the S-332B and S-332D pump stations are necessary to protect the public health, safety, and welfare; the health of animals, fish or aquatic life; and recreational, commercial, industrial, agricultural and other reasonable uses.

15. Suspension of permit conditions, statutes and rules, as noted in paragraph 19 of the following section, is required to prevent any hindrance or delay of necessary action in coping with the emergency.

**THEREFORE, IT IS ORDERED:**

**16. Description of Authorized Project**

The Corps is hereby authorized to continue operating and monitoring the S-332B pump station as required by Emergency Final Order No. 00-0899 issued by the Department April 21, 2000 and amended June 19, 2000. The Corps is further authorized to continue operating and monitoring the S-332D pump station as required by Emergency Final Order No. 99-2242 issued by the Department December 30, 2000. Operation of the S-332B and S-332D pump stations and appurtenant facilities shall only be performed for the purpose of complying with the U. S. Fish and Wildlife Service's



authorized by this order.

(b) The Corps shall avoid any actions that would adversely affect sub-populations C and D of the endangered sparrow. In the event that either the Department or the Corps subsequently determines that the proposed emergency operation activities will adversely affect or are adversely affecting sub-populations C or D of the endangered sparrow, the Corps shall cease emergency operations affecting sub-populations C or D. If the Corps makes the above determination, it shall notify the Department at the addresses and telephone numbers listed below within 24 hours of the date of such determination.

(c) All activities authorized by this Emergency Final Order shall be performed using appropriate best management practices. For activities conducted in or discharging to wetlands or other

Office of Ecosystem Projects  
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Tallahassee, Florida 32399-3000  
Telephone (850) 488-4892; Fax (850) 488-7093

Florida Department of Environmental Protection  
Everglades Technical Support Section  
2600 Blair Stone Road, MS 3560  
Tallahassee, Florida 32399-2400  
Telephone (850) 921-5213; Fax (850) 921-6876

Florida Department of Environmental Protection  
Southeast District Office  
P. O. Box 15425  
West Palm Beach, Florida 33416-5426  
Telephone (561) 681-6600; Fax (561) 681-6755

(e) This Emergency Final Order conveys no title to land or water, does not constitute State recognition or acknowledgment of title, and does not constitute authority for the use of sovereignty land of Florida seaward of the mean high-water line, or, if established, the erosion control line, unless herein provided and the necessary title, lease, easement, or other form of consent authorizing the proposed use has been obtained from the Board of Trustees of the Internal Improvement Trust Fund.

(f) This Emergency Final Order does not convey to the Corps or create in the Corps any property right, or any interest in real property, nor does it authorize any entrance upon or activities on

practices, or operations regulated or required under this Emergency Final Order; and to sample or monitor any substances or parameters at any location reasonably necessary to assure compliance with this Emergency Final Order.

#### **18. Specific Conditions**

The Corps will continue to comply with the Specific Conditions (Paragraph 15) of Emergency Final Order No. 00-0889, issued April 21, 2000 and the Specific Conditions (Paragraph 15) of Emergency Order No. 99-2242, issued December 30, 1999, which are hereby incorporated by reference. The monitoring plans referred to in those Specific Conditions are appended to this Final Order as Exhibits A and B.

#### **19. Suspension of Statutes and Rules**

The following provisions of permits, statutes and rules are hereby suspended for the activities authorized by this Order for the duration of this Order:

(a) For those activities noted above, subject to the limitations, duration and other provisions of this Order, all requirements for permits, leases, consents of use or other authorizations under Chapters 253, 373, 376 and 403 of the Florida Statutes, and rules adopted thereunder.

(b) Notice requirements of sections 253.115, and 373.413 of the Florida Statutes and rules 18-21, 62-4, and 62-312 of the Florida Administrative Code; and

(c) Application fee, lease fee, and easement fee requirements of sections 373.109 of the Florida Statutes and Rules 18-21, and 62-4 of the Florida Administrative Code.

#### **20. Other Authorizations Required**

Nothing in this Emergency Final Order shall eliminate the necessity for obtaining any other federal, state, water management district, or local permits or other authorizations that may be required.

**21. Adverse Off-Site Impacts**

(a) The Corps shall ensure that adverse off-site water resource related impacts do not occur as a result of this Emergency Final Order and shall fully monitor conditions related to the activities authorized by this order.

(b) The correction of any erosion, shoaling, water quality, or flooding problems that result from the operation of the structures authorized by this order shall be the sole responsibility of the

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Corps. In addition, the Corps shall immediately resolve such problems to the Department's satisfaction.

(c) If any adverse water quality, water quantity, or other negative environmental impacts occur as a result of this Emergency Final Order, the Department reserves the right to immediately revoke or modify this authorization upon written notice.

**22. Immunity from Liability**

The Department's immunity from liability under Section 373.443 of the Florida Statutes for any damages that might result from the activities authorized by this Emergency Final Order shall not be diminished by the terms of this order or any activities taken pursuant to this order.

**23. Water Quality Certification**

The Department waives water quality certification for those activities authorized by this Emergency Final Order.

**24. Violation of Conditions of Emergency Final Order**

Failure to comply with the conditions set forth in this Emergency Final Order shall constitute a violation of a Department Final Order under chapters 373, 376, and 403 of the Florida Statutes, and enforcement proceedings may be brought in any appropriate administrative or judicial forum.

**25. Expiration Date**

This Emergency Final Order shall be effective immediately upon execution by the Secretary of the Department and shall remain in effect until June 30, 2001, unless rescinded, modified or extended by further order of the Department.

**NOTICE OF RIGHTS**

Any person to whom this emergency order is directed may petition the Department for a hearing before the agency head in accordance with section 373.119 of the Florida Statutes.

Any party substantially affected by this order has the right to seek judicial review of it under Section 120.68 of the Florida Statutes, by filing a notice of appeal under Rule 9.110 and 9.190 of the Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, Mail Station 35, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000, and by filing a copy of the notice accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed within thirty days after this order is filed with the clerk of the Department.

**DONE AND ORDERED** on this 24<sup>th</sup> day of October 2000 in Tallahassee, Florida.

**FILING AND  
ACKNOWLEDGMENT  
FILED**, on this date under  
Section 120.52 of the Florida  
Statutes, with the designated  
Department Clerk, receipt of  
which is hereby acknowledged.

Beverly Reardon

10-24-00

DATE

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

David B. Struhs  
for DAVID B. STRUHS  
Secretary  
3900 Commonwealth Boulevard  
Tallahassee, FL 32399-3000



### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Emergency Final Order was sent by facsimile transmission to the following persons on this 25<sup>th</sup> day of October 2000:

Colonel Greg May,  
District Engineer  
U. S. Army Corps of Engineers,  
Jacksonville District  
P. O. Box 4970  
Jacksonville, Florida 32232-0019  
FAX (904) 232-1213

Frank Finch, Executive Director  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, FL 33406  
FAX (561) 697-7219

John Fumero, General Counsel  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, FL 33406  
FAX (561) 687-6276

Lawrence E. Belli  
Everglades National Park  
40001 State Park Road  
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FAX (305) 242-7711

Dexter Lehtinen, Esq.  
7700 North Kendall Drive  
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Miami, Florida 33156  
FAX (305) 279-1365

Richard E. Bonner, P.E.  
Deputy District Engineer  
U. S. Army Corps of Engineers,  
Jacksonville District  
P. O. Box 4970  
Jacksonville, Florida 32232-0019  
FAX (904) 232-1213

Steven W. Forsythe  
U. S. Fish and Wildlife Service  
P. O. Box 2676  
Vero Beach, Florida 32961-2676  
FAX (561) 564-7393

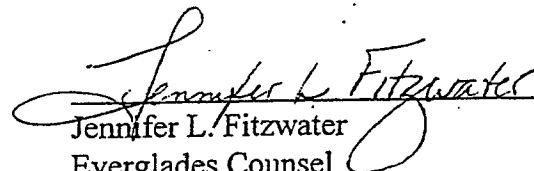
Billy Cypress, Tribal Chairman  
Miccosukee Tribe of Indians of Florida  
P. O. Box 440021  
Tamiami Station  
Miami, Florida 33144  
FAX (305) 553-3644

Juan Margolis, Chairman  
Miami-Dade Bd. of County Commissioners  
111 NW 1<sup>st</sup> Street  
Suite 220  
Miami, Florida 33128  
FAX (305) 375-5569

Seminole Tribe of Florida  
c/o of Steve Walker, Esq.  
Lewis, Longman and Walker  
1700 Palm Beach Lakes Boulevard  
Suite 1000  
West Palm Beach, Florida 33401  
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Thomas K. MacVicar  
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STATE OF FLORIDA, DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

  
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Telephone: (850) 488-9314

**ADDITIONAL COPIES FURNISHED BY U.S. MAIL OR DELIVERED TO:**

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Homestead, Florida 33034

Allen Egbert

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Tallahassee, Florida 32399-2400

Mary Ann Poole

Florida Game and Fresh Water Fish Comm

Terry Rice, Miccosukee Tribe  
c/o Southeast Environmental Research Program  
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